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June 6, 2022

VIA E-FILING

Re: Commonwealth Railway, Incorporated – Trackage Rights Exemption –  
Norfolk Southern Railway Company  
Surface Transportation Board Docket No. FD 36613

Dear Ms. Brown:

Enclosed for filing in the above referenced docket is a Trackage Rights Notice of Exemption for Commonwealth Railway, Incorporated ("CWRY"). In addition, CWRY is filing a motion for protective order under 49 CFR § 1140.14(b).

The filing fee has been paid via pay.gov. If there are any questions related to this filing, please contact me.

Sincerely,



Justin J. Marks  
Counsel to Commonwealth  
Railway, Incorporated

Enclosure

FILED  
June 6, 2022  
SURFACE  
TRANSPORTATION BOARD

FEE RECEIVED  
June 6, 2022  
SURFACE  
TRANSPORTATION BOARD

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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STB Docket No. FD 36613

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**COMMONWEALTH RAILWAY, INCORPORATED  
– TRACKAGE RIGHTS EXEMPTION –  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**VERIFIED NOTICE OF EXEMPTION**

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*(color images included)*

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*Attorneys for  
Commonwealth Railway, Incorporated*

Dated: June 6, 2022

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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STB Docket No. FD 36613

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**COMMONWEALTH RAILWAY, INCORPORATED  
– TRACKAGE RIGHTS EXEMPTION –  
NORFOLK SOUTHERN RAILWAY COMPANY**

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**VERIFIED NOTICE OF EXEMPTION**

Commonwealth Railway, Incorporated (“CWRY”), a Class III railroad, files this Verified Notice of Exemption (“Notice”), pursuant to 49 C.F.R. § 1180.2(d)(7), for CWRY’s acquisition of local trackage rights over a line of railroad owned by Norfolk Southern Railway Company (“NSR”) pursuant to a written trackage rights agreement between CWRY and NSR. NSR has agreed to grant trackage rights to CWRY for the right to operate local service in and near Fairview, West Virginia, from approximately States Run Road at Milepost LR 77.3 to the end of the track at approximately Milepost LR 79.6, a total distance of approximately 2.3 miles (the “Subject Trackage”). A Map of the Subject Trackage is attached hereto as Exhibit A. The trackage rights will be effective on or after the effective date of the Board’s decision.

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal, or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights covered by this Notice are based

upon a written agreement, a copy of which is attached hereto as Exhibit B,<sup>1</sup> and is not being sought in a responsive application in a rail consolidation proceeding. Thus, the class exemption is applicable.

### **Supporting Information**

In accordance with the provisions of 49 C.F.R. §1180.4(g), CWRV provides the following information as required by 49 C.F.R. §1180.6(a)(1)(i)-(iii), (a)(5), (a)(6), and (a)(7)(ii):

#### **(a)(1)(i) Description of Proposed Transaction**

NSR owns and operates the Subject Trackage which is used to provide service to the American Consolidated Natural Resources, Inc. (“ACNR”) mine operation at Fairview, WV. NSR is granting CWRV trackage rights to enable CWRV to provide local switching service to and from the ACNR facility.

The name, business address and telephone number of Applicant are:

Commonwealth Railway, Incorporated  
13901 Sutton Park Drive South, Suite 270  
Jacksonville, FL 32224

The name, business address and telephone number of counsel to whom questions regarding the transaction can be addressed are:

Eric M. Hocky  
Clark Hill PLC  
Two Commerce Square  
2001 Market St.  
Suite 2620  
Philadelphia, PA 19103  
(215) 640-8523

Justin J. Marks  
Clark Hill PLC  
1001 Pennsylvania Ave. N.W.

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<sup>1</sup> Exhibit B is a “public” version of the Trackage Rights Agreement. A “highly confidential” version of the Agreement is also being filed along with a motion for protective order.

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Washington, DC 20004  
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**(a)(1)(ii) Consummation Date**

CWRY intends to commence operations on or after July 7, the anticipated effective date of this Notice.

**(a)(1)(iii) Purpose of Transaction**

NSR is granting CWRY trackage rights on the Subject Trackage to allow CWRY to provide local switching service to and from the ACNR facility at Fairview, WV.

**(a)(5) States in which Property of the Applicant is Situated**

CWRY currently operates in the Commonwealth of Virginia, and the Subject Trackage is located in the State of West Virginia.

**(a)(6) Map**

A map showing the Subject Trackage is attached as Exhibit A.

**(a)(7)(ii) Agreement**

A copy of the Trackage Rights Agreement is attached as Exhibit B.

**Labor Protection**

Applicant understands that any employees adversely affected by the trackage rights are entitled to protection under the conditions imposed in *Norfolk and Western Railway Company - Trackage Rights - Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Railway, Inc. - Lease and Operate - California Western Railroad*, 360 I.C.C. 653 (1980).

**Caption Summary**

Attached as Exhibit C is the caption summary required by 49 C.F.R. §1180.4(g)(2)(ii).

### **Environmental and Historic Documentation**

Under 49 C.F.R. §1105.6(c)(4) and 49 C.F.R. §1105.8(b)(3), no environmental or historic documentation is required.

### **Conclusion**

Based on the information provided above, CWRY requests that the Board issue a notice of exemption for the local trackage rights that are the subject of this Notice.

Respectfully submitted,



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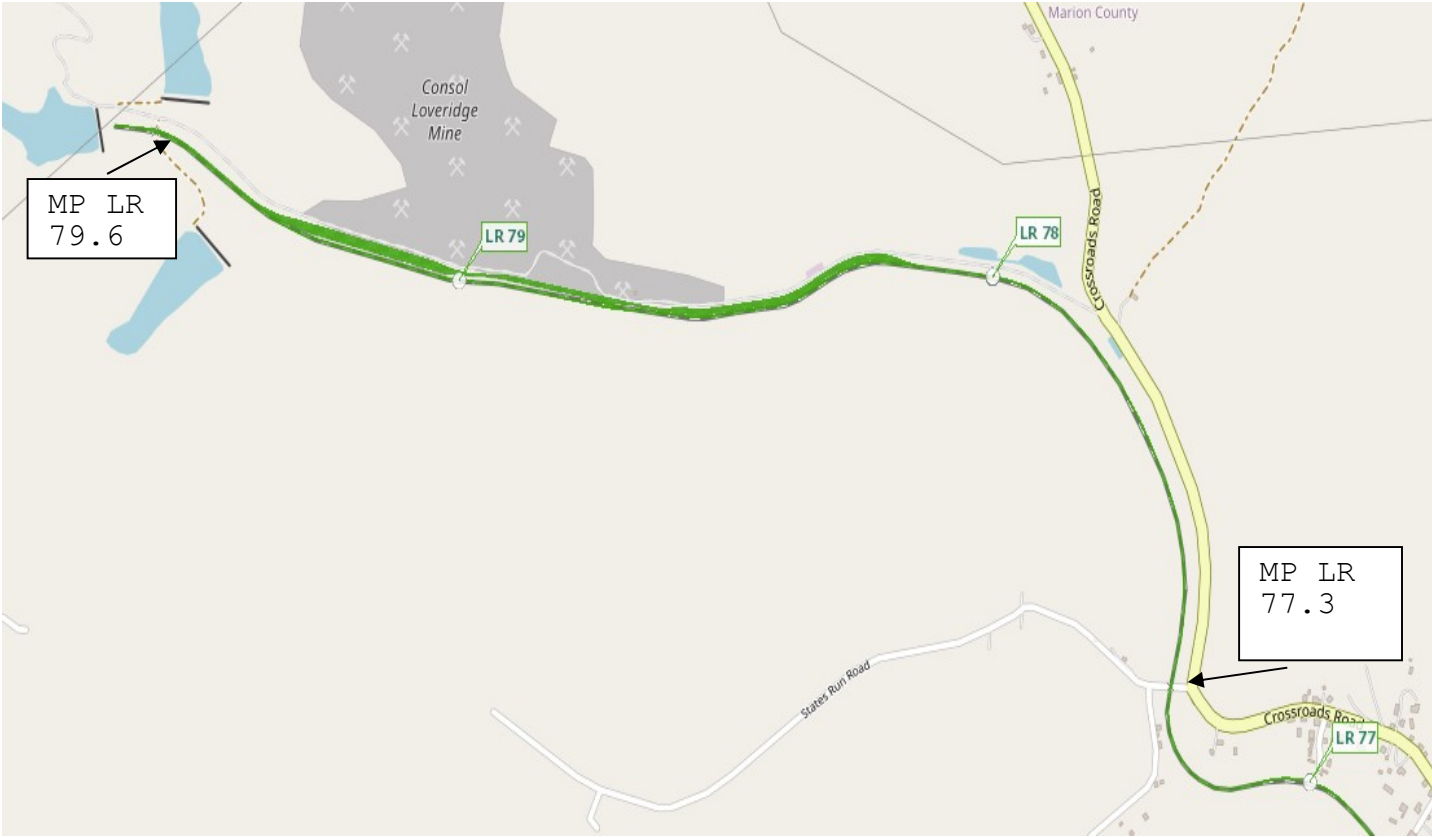
*Attorneys for  
Commonwealth Railway, Incorporated*

Dated: June 6, 2022

# **EXHIBIT A**

## **MAP**

EXHIBIT A  
SUBJECT TRACKAGE



## **EXHIBIT B**

# **TRACKAGE RIGHTS AGREEMENT (PUBLIC VERSION)**

# **TRACKAGE RIGHTS AGREEMENT**

**Between**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**And**

**COMMONWEALTH RAILWAY, INCORPORATED**

**THIS TRACKAGE RIGHTS AGREEMENT**, (“Agreement”), entered into as of this 24th day of May, 2022 (the “Effective Date”), by and between COMMONWEALTH RAILWAY, INCORPORATED, a Virginia corporation (hereinafter referred to as “User”), and NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation (hereinafter referred to as “NSR”). Each of User and NSR shall individually be referred to as a “Party” and collectively as the “Parties”.

## **WITNESSETH:**

**WHEREAS**, NSR owns and operates a line of railroad in the Fairview, WV area (“NSR Line”) utilized, among other purposes, to permit service to the American Consolidated Natural Resources, Inc. (“ACNR”) mine operation at Fairview, WV; and

**WHEREAS**, ACNR has requested and NSR is agreeable to granting User trackage rights for the purposes of ACNR employing User to more efficiently handle local switching of the ACNR facility located along the NSR Line, subject to the terms and conditions set forth herein.

**NOW, THEREFORE**, User and NSR, intending to be legally bound, agree as follows:

## **ARTICLE 1. GRANT OF TRACKAGE RIGHTS**

1.1 Subject to the terms and conditions herein provided, NSR hereby grants to User the right to operate in local service only, its trains, locomotives, cars, and equipment with its own crews (hereinafter referred to as the “Trackage Rights”) over the following segments of the NSR Line (hereinafter referred to as the “Subject Trackage”), as shown on the plan attached hereto, made a part hereof and marked Exhibit “A”:

The portion of the NSR Line from at/or near States Run Road at MP LR 77.3+/- to the end of the track at MP LR 79.6 +/-.

1.2 NSR and User shall deliver railroad cars, loaded and empty, to the other party on such portions of the Subject Trackage (that certain portion of the Subject Trackage being hereinafter referred to as the “Delivery Tracks”) as designated by the NSR officer in charge of operations on the Subject Trackage. Specific procedures for exchange of railroad cars will be mutually agreed upon between the local operating officers of the Parties.

1.3 For traffic exchanged between NSR and User on the Subject Trackage, cars will be considered exchanged when the train is clear of all road crossings, all cars have been placed on

the Delivery Track(s), the delivering party has properly secured the brakes and completed mechanical inspection and air brake tests, disconnected its locomotives from the cars (or, if locomotives are running through, delivering party has disembarked from the locomotives) and has furnished to the receiving party billing, routing and shipping instructions, air test form if applicable, dangerous commodities forms, and any other data necessary for movement. For the avoidance of doubt and for the purposes of Article 12 herein, the train will be deemed to be in the possession of User upon the exchange of the train from NSR, and the train will be deemed to be in the possession of NSR upon the exchange of the train from User.

1.4 User shall have the right to exchange railroad cars with CSX Transportation, Inc. on the Subject Trackage pursuant to a separate interchange agreement to be negotiated between User and CSXT, subject to review and approval by NSR, which approval shall not be unreasonably withheld, conditioned, or delayed.

## **ARTICLE 2. USE OF SUBJECT TRACKAGE**

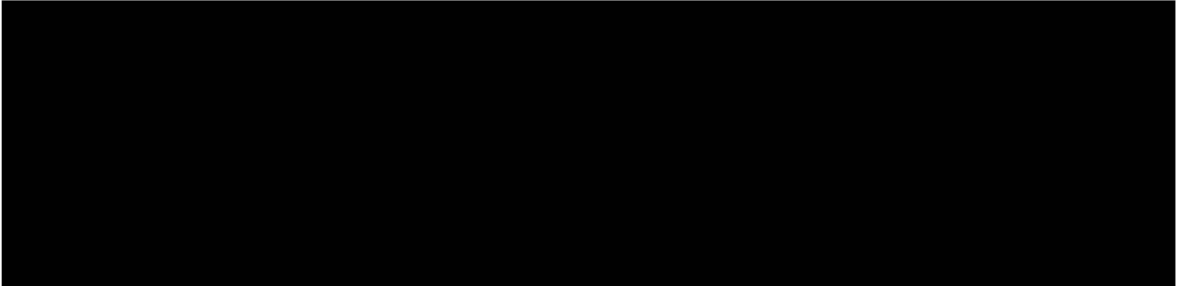
2.1 User's use of the Subject Trackage shall be in common with NSR and any other user of the Subject Trackage and NSR's right to use the Subject Trackage shall not be diminished by this Agreement. NSR shall retain the exclusive right to grant to other persons rights of any nature on the Subject Trackage; provided that the rights granted to such other users do not unreasonably interfere with the exercise of User's rights hereunder.

2.2 Except as may be otherwise provided by this Agreement, User shall not use any part of the Subject Trackage for the purpose of switching, storage, or servicing of cars or equipment, or the making or breaking up of trains, except that nothing contained herein will, upon prior approval of NSR, preclude the emergency use by User of such auxiliary tracks as may be designated by NSR for such purposes.

2.3 NSR shall have exclusive control of the management and operation of the Subject Trackage. User shall not have any claim against NSR for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by User is interrupted or delayed at any time from any cause.

2.4 User shall have the right to operate in either direction over the Subject Trackage.

2.5



## **ARTICLE 3. RESTRICTIONS ON USE**

The Trackage Rights herein are granted for the sole purpose(s) of User using the Subject Trackage to operate its trains to provide local switching service, in common with NSR and any other user now permitted or admitted in the future, to and from the industrial tracks serving ACNR.

**ARTICLE 4. COMPENSATION**

[REDACTED]

**ARTICLE 5. PAYMENT OF BILLS**

- 5.1 All payments called for under this Agreement shall be made by User within thirty (30) days after receipt of bills therefor. No payments shall be withheld because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the Parties shall be adjusted in the accounts of a subsequent month. The records of each Party, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other Party for a period of [REDACTED] from the date of billing.
- 5.2 Bills rendered pursuant to the provisions of this Agreement, if any, other than those set forth in Article 4, shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by the performing party at the time any work is performed by one Party for the other Party.
- 5.3 With the exception of any claims arising out of or related to any indemnification obligation herein, no bill shall be rendered, honored, recognized, or considered if filed later than [REDACTED] after the last day of the calendar month in which the expense covered thereby is incurred. No exception to any bill shall be honored, recognized, or considered if filed after the expiration of [REDACTED] from the last day of the calendar month during which the bill was rendered.

**ARTICLE 6. MAINTENANCE OF SUBJECT TRackage**

- 6.1 Except as provided by this Article, NSR shall be responsible for all maintenance of the Subject Trackage, including but not limited to track, bridges, signals, detectors and highway grade crossing equipment as applicable. NSR shall maintain the Subject Trackage in reasonably good condition for the use herein contemplated, but NSR does not guarantee the condition of the Subject Trackage, or that operation thereover will not be interrupted. Furthermore, except as may be otherwise provided in Article 12 hereof, User shall not by reason of failure or neglect on the part of NSR to maintain, repair, or renew the Subject Trackage, have or make any claim or demand against NSR or its parent corporation, subsidiaries and affiliates or any or all of their respective directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by a party resulting from any such failure or neglect. If the use of

the Subject Trackage shall at any time be interrupted or traffic thereon is delayed for any cause, NSR shall with reasonable diligence restore the Subject Trackage for the movement of cars.

**ARTICLE 7.        RESERVED**

**ARTICLE 8.        ADDITIONS, RETIREMENTS, AND ALTERATIONS**

- 8.1     NSR, from time to time and at its sole cost and expense, may make such changes in, additions and betterments to, and retirements from the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation thereof or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.
- 8.2     If User requests NSR make changes in or additions and betterments to the Subject Trackage, including without limitation changes in communication or signal facilities, for purposes required to accommodate User's operations beyond that required for NSR's operation, NSR shall have the option to either make such changes in or additions and betterments to the Subject Trackage, in which case User shall pay to NSR the cost thereof, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities, or to deny such request.

**ARTICLE 9.        MANAGEMENT AND OPERATIONS**

- 9.1     When operating over the Subject Trackage, User's locomotives and crews will be equipped to communicate with NSR on radio frequencies normally used by NSR in directing train movements on the Subject Trackage.
- 9.2     User's operations on the Subject Trackage pursuant to this Agreement shall be governed by permission and occupancy to be obtained in advance of any movement on the Subject Trackage from NSR's dispatcher or other designated representative at NSR's rail traffic control center or such other location as NSR may designate. Further, User shall ascertain that said Subject Trackage is clear and shall await confirmation from said representative that such permission has been issued to allow User's movements on or over the Subject Trackage. Upon completing its operations and/or clearing the Subject Trackage, User will notify NSR's designated representative that it has completed its operations and/or that its equipment has cleared the Subject Trackage. Once User has notified NSR's representatives that it has cleared the Subject Trackage, User will not reenter or occupy the Subject Trackage without again obtaining permission from NSR's representative. User shall provide and maintain at its expense all communication facilities needed as may be required by NSR to permit User to use NSR's trackage. Notwithstanding the foregoing, the Parties may agree to install a split point derail or other such protective device on the Subject Trackage and to implement associated procedures for the use thereof as agreed to by the Parties' respective local transportation officers to control

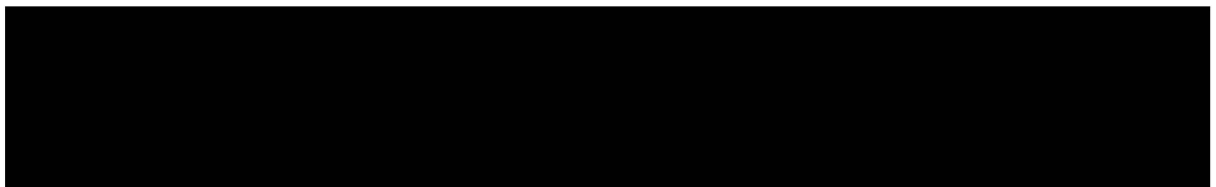
occupancy of the Subject Trackage. Should the Parties elect to employ such alternate measures, any such mutually agreeable alternate occupancy protection shall be deemed to be compliant with this Section 9.2.

- 9.3 User shall comply with the provisions of the Federal Railroad Safety Act, the Federal Locomotive Inspection Act, and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars, and equipment while such trains, locomotives, cars, and equipment are being operated over the Subject Trackage. User shall indemnify, protect, defend, and save harmless NSR and its parent corporation, subsidiaries, and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed upon NSR or its parent corporation, subsidiaries, and affiliates, or all of their respective directors, officers, agents and employees under such laws, rules, and regulations by any public agency, authority, or court having jurisdiction over the Subject Trackage or over User's operations on the Subject Trackage, when attributable to the failure of User to comply with its obligations in this regard.
- 9.4 User in its use of the Subject Trackage shall comply in all respects with its own safety and general conduct rules, equipment operation and train handling rules, and hazardous materials instructions. While using the Subject Trackage, User shall comply in all respects with the operating rules, timetables, and special instructions of NSR, and the movement of User's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of NSR; provided, however, that such operating rules, timetables, and special instructions and orders of the transportation officers of NSR shall not unjustly discriminate between the Parties. NSR will not make any rule or restriction applying to User's trains that does not apply equally to NSR's trains. User's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by NSR's operating rules and regulations, without the prior consent of NSR. The Parties shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All User trains shall be powered to permit operation at the maximum track speed allowed for the Subject Trackage's class of track.
- 9.5 User shall make such arrangements with NSR as may be required to have all of its employees who shall operate its trains, locomotives and cars over the Subject Trackage qualified for operation thereover, and User shall pay to NSR, upon receipt of bills therefor, any reasonable cost incurred by NSR in connection with the qualification of such employees of User, as well as the reasonable cost of pilots furnished by NSR, until such time as such employees are deemed by the appropriate examining officer of NSR to be properly qualified for operation as herein contemplated, such determination not to be unreasonably withheld, conditioned or delayed.
- 9.6 NSR shall have the right to exclude from its tracks any employee of User, except officers,

determined by NSR to be in violation of NSR's rules, regulations, orders, practices, or instructions promulgated in the normal course of business in writing by NSR in its timetable or otherwise, and provided in advance to User. The decision to bar any employee of User from its tracks will not be interpreted as a request for User to fire the individual(s). User shall release, indemnify, defend, and save harmless NSR from and against any and all claims and expenses resulting from such exclusion.

- 9.7 The trains, locomotives, cars and equipment of User, NSR, and any other present or future user of the Subject Trackage or any portion thereof, will be operated without prejudice or partiality to any party and in such manner as shall afford the most economical and efficient manner of movement of all traffic.
- 9.8 User shall ensure that its locomotives are fueled to a capacity that enables User's trains to traverse the Subject Trackage without having to be fueled.
- 9.9 In the event that (i) one of User's trains is forced to stop on the Subject Trackage and is unable to proceed due to mechanical failure of User's equipment or any other cause not resulting from an accident or derailment, (ii) one of User's trains fails to maintain the speed required by NSR on the Subject Trackage; or (iii) in emergencies, crippled or otherwise defective cars are set out of User's trains on the Subject Trackage, NSR will have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage, and User will reimburse NSR for the cost incurred by NSR in rendering any such assistance.
- 9.10 If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Subject Trackage, NSR will have the option to perform such work, and User will reimburse NSR for the cost incurred by NSR with respect thereto.
- 9.11 In the event NSR and User agree that NSR should retain employees or provide additional employees for the sole benefit of User, the Parties will enter into a separate agreement under which User will bear all cost and expense for any such retained or additional employees provided, including recruitment and training cost, and including without limitation all cost and expense associated with labor protective payments which are made by NSR and which would not have been incurred had the retained or additional employees not been provided.

**ARTICLE 10. MILEAGE AND CAR HIRE**



## **ARTICLE 11.            CLEARING OF WRECKS**

11.1 Whenever User's use of the Subject Trackage requires rerailing, wrecking service or wrecking train service, NSR shall be responsible for the provision of such service, including the repair and restoration of roadbed, track and structures so as to minimize the impact on NSR and User operations. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom, shall be apportioned in accordance with the provisions of Article 12 hereof. All locomotives, cars, and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by User at the time of such wreck, shall be promptly delivered to User.

## **ARTICLE 12.            LIABILITY**

12.1 Without changing the responsibility for the provision of emergency services as set forth in Article 11, the responsibility and liability between the Parties for: (i) any personal injury or death of any person (including employees of the Parties and third persons), (ii) any real or personal property damage of any person (including property of the Parties and third persons), (iii) any damage or destruction to the environment (including land, air, water, wildlife and vegetation), and (iv) all cleanup and remedial expenses, court costs, settlements, claims, judgments, litigation expenses, and reasonable attorneys' fees resulting from the use of the Subject Trackage by either Party as described herein, all of which are collectively referred to as a "Loss", shall be allocated as follows:

- (a) If a Loss results from use of the Subject Trackage involving the trains, locomotives or other units of motive power (hereinafter in Article 12, "Locomotives"), cars, and/or equipment of only one Party, then such Party shall be solely responsible for the Loss, even if caused partially or completely by the other Party.
- (b) Losses involving the trains, Locomotives, cars, and/or equipment of both Parties.
  - (i) Except as otherwise provided in Section 12.1(b)(ii), if a Loss results from use of the Subject Trackage involving the trains, Locomotives, cars, and/or equipment of both NSR and User, then: (A) each Party shall be solely responsible for any Loss to its own employees, trains, Locomotives, equipment, and cars in its own account including lading and (B) responsibility for any Loss to the Subject Trackage and Loss sustained by third parties shall be divided equally between the two Parties, regardless of the proportionate responsibility between them as to the cause of the Loss.
  - (ii) If any damage of the environment, including without limitation land, air, water, wildlife, and vegetation, results from use of the Subject Trackage involving both NSR and User's trains, Locomotives, cars, and/or

equipment, then as between themselves, (A) NSR shall be solely responsible for any damage or destruction to the environment (including exacerbation of existing conditions) and to third parties which results solely from a substance transported in NSR's cars and equipment and/or NSR's Locomotive(s) from which there is a release, (B) User shall be solely responsible for any damage or destruction to the environment (including exacerbation of existing conditions) and to third parties that results solely from a substance transported in User's cars and equipment and/or User's Locomotive(s) from which there was a release, and (C) NSR and User shall be responsible, in proportion to the total number of Locomotives, cars, and/or equipment of each Party from which there was a release, for any damage or destruction to the environment (including exacerbation of existing conditions) and to third parties that results from one or more substances transported in cars or equipment in the revenue waybill and car hire accounts or Locomotives of both NSR and User from which there were releases.

- (c) If a Loss results from use of the Subject Trackage involving the trains, Locomotives, cars, and/or equipment only one of the Parties and one or more third parties, then such Party shall be solely responsible for such Loss as between the Parties.
- 12.2 If a Loss occurs other than one resulting from the use of the Subject Trackage by the trains, Locomotives, cars, and/or equipment of either NSR or User, then each of NSR and User is solely responsible for any Loss to its own employees, trains, Locomotives, cars, and/or equipment, even if caused partially or completely by the other Party.
- 12.3 Except as provided in Section 9.11, each Party agrees to indemnify and hold harmless the other Party and its parent corporation, subsidiaries and affiliates, and any or all their respective directors, officers, agents and employees from and against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of its own employees, either pursuant to a collective bargaining agreement or employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement. It is the intention of the Parties that each Party shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees. Similarly, each Party agrees to indemnify and hold harmless the other Party against any and all costs and payments, including judgments, damages, attorneys' fees and litigation expenses, arising out of claims, lawsuits and actions brought by or on behalf of its own employees pursuant to any provision of law, including common law, and based on employment arising out of the operations covered by this Agreement, except to extent otherwise specifically provided in this Agreement.
- 12.4 Whenever any Loss is assumed by or apportioned to a Party under the foregoing

provisions, that Party shall forever protect, defend, indemnify, and save harmless the other Party and its parent corporation, subsidiaries and affiliates, and any and all of their respective directors, officers, agents, and employees from and against such Loss assumed by that Party or apportioned to it, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of the indemnitee or its directors, officers agents, or employees.

- 12.5 In every case of death or injury suffered by an employee of either User or NSR, when compensation to such employees or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employers' liability or other law, and either of said Parties, under the provisions of this Agreement, is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such Party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.
- 12.6 For purposes of determining liability, pilots furnished by NSR to User pursuant to this Agreement shall be considered as the employees of User while such employees are on duty as pilots for User.
- 12.7 If any suit or action shall be brought against either Party for damages which under the provisions of this Agreement are in whole or in part the responsibility of the other Party, said other Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expense and attorneys' fees incurred in such suit according to its liability assumed hereunder.
- 12.8 In the event of a Loss as set out herein, the Parties shall be bound by the Freight Claim Rules, Principles, and Practices of the AAR as to the handling of any claims for the loss or damage to lading.
- 12.9 Notwithstanding any provision of this Agreement to the contrary, for the purpose of this Article 12, the word "equipment" shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and (iii) vehicles and machinery that, at the time of an occurrence, are on the Subject Trackage or its right of way for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.
- 12.10 Notwithstanding any and all of the forgoing provisions of this Article 12, in the event a Loss occurs while the Subject Trackage is being used by NSR and/or User, and such Loss is attributable solely to the willful or wanton negligence of only one of the Parties, then the Party which was so willfully or wantonly negligent shall be solely responsible for such Loss. The Parties shall submit disputes involving the determination of whether a Loss is attributable solely to the willful or wanton negligence of one of the Parties, but no other disputes under this Agreement, to binding arbitration under the commercial arbitration rules of the American Arbitration Association.

12.11 Notwithstanding any provision of this Agreement to the contrary and regardless of the nature of the cause of action (whether in contract, tort or otherwise), in no event shall either Party be liable to the other Party for any incidental, special, indirect, consequential or punitive damages whatsoever (including but not limited to lost profits, business interruption expenses, lost use of equipment, liability to a Party's customers for liquidated damages or other damages) arising out of or related to the activities contemplated by this Agreement, even if advised of the possibility of such damages. Except as otherwise provided in Sections 12.7 and 13.1(c) hereof, under no circumstances shall either Party be entitled to recover its attorneys' fees and legal cost and expenses from the other Party for a dispute arising out of this Agreement.

### **ARTICLE 13.        CLAIMS**

13.1 Except as provided in Section 13.1(a) below, all claims, injuries, death, property damages, and losses arising out of or connected with this Agreement will be investigated, adjusted, and defended by the Party bearing the liability, cost, and expense therefor under Article 12 of this Agreement.

- (a) Each Party shall investigate, adjust and defend all freight loss and damage claims filed with it in accordance with 49 U.S.C. § 11706 and 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract entered into pursuant to 49 U.S.C. § 10709.
- (b) In the event a claim or suit is asserted against NSR or User which is the other's duty hereunder to investigate, adjust or defend, then, unless otherwise agreed, such other Party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.
- (c) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Agreement, except that salaries or wages of full-time agents, full-time attorneys and other full-time employees of either Party engaged directly or indirectly in such work shall be borne by such Party.
- (d) Excluding freight loss and damage claims filed in accordance with 49 U.S.C. § 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract entered into pursuant to 49 U.S.C. § 10709, neither Party shall settle or compromise any claim, demand, suit or cause of action for which the other Party has any liability under this Agreement without the concurrence of such other Party if the consideration for such settlement or compromise exceeds [REDACTED].

13.2 It is understood that nothing in this Article 13 shall modify or waive the conditions, obligations, assumptions or apportionments provided in Article 12.

#### **ARTICLE 14.           INDEMNITY COVERAGE**

- 14.1 As part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party shall also extend to and indemnify the parent corporation, subsidiaries, and affiliates of such other Party, and all of their respective directors, officers, agents, and employees.

#### **ARTICLE 15.           INSURANCE**

- 15.1 User shall procure and maintain in effect during the life of this Agreement a policy or policies of insurance covering the liability to which it is or may be subject under this Agreement. Such insurance shall provide minimum limits of [REDACTED] per occurrence but may be subject to an annual aggregate limit of [REDACTED] and a per occurrence deductible not in excess of [REDACTED].
- 15.2 If the insurance provided under this Article 15 takes the form of a Claims Made Policy, User agrees to purchase whatever supplemental coverage may be necessary to provide continuous coverage of its potential liability under this Agreement, with annual occurrence and annual aggregate limits no less than those required hereunder, for a period of time at least [REDACTED] following the termination of this Agreement. User further agrees to immediately give written notice to the Director Risk Management, Norfolk Southern Railway Company, 650 W Peachtree St NW, Atlanta GA 30308, of any claim or notice of incident or notice of potential claim that is required to be reported to its liability insurance company.
- 15.3 On or before any anniversary date of this Agreement which occurs more than one (1) year after its Commencement Date, NSR may require an increase in the amount of insurance coverage required by this Article 15, or changes in the terms and conditions of the policy or policies, provided the amount of the increase does not exceed an average of [REDACTED] for each year that this Agreement has been in effect.
- 15.4 Every policy of insurance obtained by User pursuant to the requirements of this Article 15 shall contain provisions requiring that the insurance carriers give NSR at least thirty (30) days' notice, in writing, of any proposed policy cancellation. In addition, said policy or policies shall be endorsed to name NSR, including NSR's parent, affiliated and subsidiary companies, as an additional insured and shall include a severability of interests provision. The terms and conditions of each policy of insurance obtained by User to satisfy the requirements of this Article 15 will be subject to the approval of NSR.
- 15.5 Within thirty (30) days of execution of this Agreement, User will furnish to the above referenced Director Risk Management, Norfolk Southern Railway Company, 650 W. Peachtree St. NW, Atlanta, GA 30308, an accurate copy of insurance obtained pursuant to the requirements of this Agreement. Compliance with this requirement will not relieve

User of any other obligation under this Agreement and will in no way limit or modify User's obligation to provide the specific insurance coverage required by this Agreement. Evidence of subsequent renewal of such insurance or of any material change must be furnished to the above referenced Risk Manager as stipulated in Section 15.2 above.

**ARTICLE 16. TERM, TERMINATION, AND DEFAULT**

- 16.1 This Agreement shall become effective as of the Effective Date. However, User's operations over the Subject Trackage shall not commence until a date (the "Commencement Date") mutually agreed in writing between User and NSR, which date shall occur no earlier than the effective date of any required Surface Transportation Board ("STB") authorization or exemption of User's trackage rights granted by this Agreement, including compliance with any condition(s) imposed by the STB in connection with such approval or exemption.
- 16.2 The initial term of this Agreement shall be from the Commencement Date through September 30, 2027 (the "Initial Term"), and shall automatically renew thereafter for additional periods of twelve (12) months each ("Additional Term(s)") until cancelled by either Party upon written notice to the other Party not less than ninety (90) days prior to the expiration of the Initial Term or any Additional Term; provided, however, that User shall also have the right to terminate this Agreement at any time upon giving sixty (60) days' advance written notice to NSR.
- 16.3 Termination of this Agreement shall not relieve or release either Party from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination thereof.
- 16.4 In the event of any material failure on the part of User to perform its obligations under this Agreement and the continuation of such failure for a period of sixty (60) days after written notice thereof by certified mail from NSR, NSR shall have the right at its option, after first giving thirty (30) days' written notice thereof by certified mail, and notwithstanding any waiver by NSR of any prior breach thereof, to terminate this Agreement and User's use of the Subject Trackage, subject to any regulatory approval or exemption that may be required under governing law. The exercise of such right by NSR will not impair its rights under this Agreement or any cause or causes of action it may have against User for the recovery of damages.

16.5



**ARTICLE 17. REGULATORY APPROVAL**

- 17.1 Should implementation of this Agreement require the prior approval and authorization of the STB or other regulatory authority, User, at its own cost and expense, will initiate and thereafter diligently pursue such approval and authorization or an exemption therefrom. Prior to making any submission to the STB, User shall present said submission to NSR for NSR's review and approval, which approval shall not be unreasonably withheld or delayed.
- 17.2 User shall, within sixty (60) days after the date of termination or non-renewal of this Agreement or the date that the obligation to discontinue the Trackage Rights arises for any other reason under the terms of this Agreement, initiate and thereafter diligently prosecute any action to obtain approval from the STB or other regulatory body having jurisdiction authorizing abandonment or discontinuance of the Trackage Rights herein granted. If User fails to file within sixty (60) days, User hereby expressly grants to NSR an irrevocable Power of Attorney for the purpose of NSR filing with the STB, or other regulatory body having jurisdiction, on behalf of User to abandon or discontinue the Trackage Rights granted hereunder, and User further agrees to reimburse NSR for all costs incurred.

**ARTICLE 18. FORCE MAJEURE**

- 18.1 The obligations, other than payment obligations, of the Parties shall be subject to force majeure (including Acts of God, floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions, acts of public enemy, war, blockade, insurrection, vandalism or sabotage, fire, accident, wreck, derailment, washout or explosion, pandemics, strike, lockout or labor disputes experienced by the Parties, embargoes or AAR service orders, Federal Railroad Administration (FRA) orders, or governmental laws, orders, or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party.

**ARTICLE 19. ABANDONMENT OF SUBJECT TRACKAGE**

- 19.1 Notwithstanding the provisions of Article 16 of this Agreement, NSR may abandon all or part of the Subject Trackage during the Initial Term or any Additional Term, upon giving User not less than ninety (90) days' written notice of NSR's intent to abandon. In the event regulatory authority is required to effect such abandonment, User will not interfere with or oppose NSR's actions to seek and to exercise such authority. In the event regulatory authority is required for User to discontinue its own operations over the Subject Trackage, User will seek and diligently pursue such regulatory authority at the same time that NSR seeks regulatory authority to abandon the Subject Trackage, or as soon thereafter as User may do so in accordance with applicable statutes and regulations. Upon discontinuance of User's operations, this Agreement shall terminate and be of no further force and effect, except that termination of this Agreement shall not relieve or release either Party from any obligations assumed or from any liability which may have arisen or been incurred prior to said termination. As used herein, Subject Trackage means the entire Subject Trackage or any portion or portions thereof.

**ARTICLE 20.            SUCCESSORS AND ASSIGNS**

- 20.1    User may not assign this Agreement, in whole or in part, or any rights granted herein, or delegate to another party any duties hereunder, without the prior written consent of NSR. Any transfer, assignment, or delegation of this Agreement, or of any rights or duties herein granted or imposed, whether voluntary, by operation of law, or otherwise, without such consent in writing, shall be absolutely void, and at the option of the Party whose written consent should have been obtained, this Agreement may be terminated. Subject to this Article, this Agreement shall be binding upon and inure to the benefits of the Parties, their successors and assigns.

**ARTICLE 21.            NOTICE**

- 21.1    Any notice required or permitted to be given by one Party to another under this Agreement shall be deemed given on the date sent by certified mail, electronic mail or by such other means as the Parties may mutually agree, and shall be addressed as follows:

If to User:

Commonwealth Railway, Incorporated  
13901 Sutton Park Drive South, Suite 270  
Jacksonville, FL 32224  
Attention: President  
E-Mail: [LegalNotices@gwrr.com](mailto:LegalNotices@gwrr.com)

With a copy to:

Genesee & Wyoming Inc.  
20 West Avenue  
Darien, CT 06820  
Attention: General Counsel  
E-Mail: [LegalNotices@gwrr.com](mailto:LegalNotices@gwrr.com)

If to NSR:

Norfolk Southern Railway Company  
Attn: Senior Director – Interline Services  
650 W. Peachtree Street NW – Box 38  
Atlanta, Georgia, 30308  
E-Mail: [NPOInterline@nscorp.com](mailto:NPOInterline@nscorp.com)

Either Party may provide changes in the above addresses to the other Party by personal service or U.S. mail.

**ARTICLE 22.            GENERAL PROVISIONS**

- 22.1 This Agreement and each and every provision hereof is for the exclusive benefit of the Parties and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against either of the Parties.
- 22.2 This Agreement contains the entire understanding of the Parties and supersedes any and all oral understandings between the Parties.
- 22.3 No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing and signed by both Parties.
- 22.4 No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.
- 22.5 All words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms, and phrases in the railroad industry.
- 22.6 All Article headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.
- 22.7 As used in this Agreement, whenever reference is made to the trains, locomotives, cars, or equipment of, or in the account of, one of the Parties, such expression means the trains, locomotives, cars, and equipment in the possession of or operated by one of the Parties and includes such trains, locomotives, cars, and equipment which are owned by, leased to, or in the account of such Party. Whenever such locomotives, cars, or equipment are owned or leased by one Party and are in the possession or account of the other Party, such locomotives, cars, and equipment shall be considered those of that other Party in whose possession or train such locomotives, cars and equipment are located.
- 22.8 This Agreement is the result of mutual negotiations of the Parties, neither of whom shall be considered the drafter for purposes of contract construction.
- 22.9 This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia without giving effect to any choice or conflict of laws provision or rule (whether of the State of West Virginia or any other jurisdiction) that would cause the application of laws of any jurisdiction other than the State of West Virginia.
- 22.10 If any provision of this Agreement or the application thereof to any Party or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or

unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner which produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

- 22.11 This Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

**ARTICLE 23. CONFIDENTIALITY**

- 23.1 Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement or as may be necessary or appropriate for a Party to enforce its rights under this Agreement, during the term of this Agreement and during a period of three (3) years subsequent to termination of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or obtained hereunder shall be kept confidential and shall not be disclosed by either NSR or User to any third party other than each Party's respective parent corporations, subsidiaries, and affiliates, and their respective directors, officers, agents, employees, auditors, accountants and attorneys, without the prior written approval of the other Party.

*[Remainder of Page Intentionally Left Blank]*

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first above written.

COMMONWEALTH RAILWAY, INCORPORATED  
By:   
Its: **JAMES IRVIN - President - 6/2/2022 11:35:22 AM**

NORFOLK SOUTHERN RAILWAY COMPANY  
By:   
Its: Vice President

EXHIBIT A  
SUBJECT TRACKAGE



## **EXHIBIT C**

### **CAPTION SUMMARY**

**SURFACE TRANSPORTATION BOARD**

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**NOTICE OF EXEMPTION**

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Docket No. FD 36613

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**COMMONWEALTH RAILWAY, INCORPORATED  
– TRACKAGE RIGHTS–  
NORFOLK SOUTHERN RAILWAY COMPANY**

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Commonwealth Railway, Incorporated (“CWRV”), a Class III railroad, files this Verified Notice of Exemption, pursuant to 49 C.F.R. § 1180.2(d)(7), for CWRV’s acquisition of local trackage rights over a line of railroad owned by Norfolk Southern Railway Company (“NSR”) pursuant to a written trackage rights agreement between CWRV and NSR. NSR has agreed to grant trackage rights to enable CWRV to provide local switching service in and near Fairview, West Virginia, from approximately States Run Road at Milepost LR 77.3 to the end of the track at approximately Milepost LR 79.6, a total distance of approximately 2.3 miles. CWRV intends to commence trackage rights operations on or after July 7, 2022, after the effective date of the notice.

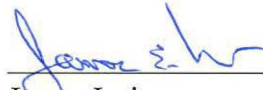
This notice is filed under 49 C.F.R. § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings

## VERIFICATION

I, James Irvin, verify under penalty of perjury that I am authorized to make this verification on behalf of Commonwealth Railway, Incorporated, and that the information included in the foregoing Notice of Exemption is true and correct to the best of my knowledge and belief.



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James Irvin  
President

Dated: June 6, 2022